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LAND-USE CONTROL, EXTERNALITIES, AND THE MUNICIPAL AFFAIRS DOCTRINE: A BORDER CONFLICT

I. INTRODUCTION

If individuals act without first establishing arrangements with those whom their actions affect and who affect them, each is likely to be sorry when he sees the price all will pay.¹

In California the power to deal with the problems of effective land use has been abdicated by the legislature in favor of municipal authorities.² While this may have been appropriate during the early years of the development of zoning³ when "cities, townships, boroughs and the like were separated by large undeveloped areas,"⁴ it is no longer possible for one municipality in a metropolitan area to deal unilaterally and effectively with all problems of land use.⁵ Since the early 1940's

1. Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797 (1973).

2. The legislature has declared its desire to give maximum control over zoning to cities and counties: "[T]he Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." CAL. GOV'T CODE ANN. § 65800 (West Supp. 1975). *But see id.* § 65803 (West 1966) (limiting the application of that chapter to general law cities and charter cities which specifically adopt the chapter). This would seem to be consistent with broad grants of authority in enabling legislation in most states. *See, e.g.*, R. ANDERSON, *AMERICAN LAW OF ZONING* (1968) [hereinafter cited as ANDERSON]; 2 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.112 (3d ed. 1966).

3. For an overview of the history of zoning in the United States, see D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* (1971) [hereinafter cited as HAGMAN]. For a more extended discussion, see ANDERSON, *supra* note 2, §§ 2.07-.13; 1 E. YOKLEY, *ZONING LAW AND PRACTICE* 1-22 (3d ed. 1953).

4. Sussna, *Local Zoning is Obsolete*, 11 CURRENT MUN. PROB. 335 (1970) [hereinafter cited as Sussna].

5. The need for approaching the problem of land use on an area-wide basis in some situations has been recognized by the courts (*see* cases cited in notes 150-69 *infra* and accompanying text) and by the commentators (*see* Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1; Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Marks & Taber, *Prospects for Regional Planning in California*, 4 PAC. L.J. 117 (1973); Sussna, *supra* note 4; Comment, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966); Comment, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593 (1970); Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107).

there has been substantial growth in metropolitan areas,⁶ growth which has brought with it many new problems that cannot and have not been confined within municipal boundaries.⁷ When one municipality chooses to use its land in a way that interferes with a neighboring municipality's land use, a conflict arises⁸ for which a means of resolution must be found if there is to be an efficient use of land resources.

An obstacle to the adoption of a means for resolving this conflict is the municipal affairs doctrine. This doctrine has emerged from the constitutional provisions⁹ which free charter cities¹⁰ from the control of

6. In the 1960's alone there was an increase of 16.6% in metropolitan population. The greatest increase was in the western region of the United States with a 28.3% rise. This growth was characterized by increased suburban sprawl with urban density decreasing from 3,752 persons per square mile in 1960 to 3,376 persons per square mile in 1970. E. HASKELL, *LAND USE AND THE ENVIRONMENT: PUBLIC POLICY ISSUES 10* (BNA Environ. Rep., Monograph No. 20 1974).

7. These problems exist in such areas as housing, transportation, pollution control, and employment. "[Local governments'] geographical jurisdictions are small, although the environmental problems they must solve know no such boundaries and cover airsheds, river basins, economic and transportation regions, and whole metropolitan areas." *Id.* at 11.

8. See note 137 *infra*.

9. CAL. CONST. art. XI, § 5.

10. There are two types of cities in California: general law cities, which are incorporated under the general laws adopted by the legislature, and charter cities, which are incorporated under article eleven, section three of the California constitution. The same section of the constitution provides that "a county . . . may adopt a charter . . ." CAL. CONST. art. XI, § 3. This section has evidently led some courts to refer to the right of chartered counties to regulate with respect to municipal affairs. See, e.g., *Bishop v. City of San Jose*, 1 Cal. 3d 56, 63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969); *In re Hubbard*, 62 Cal. 2d 119, 126-27, 396 P.2d 809, 812-13, 41 Cal. Rptr. 393, 397 (1964). The only reference to municipal affairs, however, is found in article eleven, section five, which pertains solely to the provisions of city charters. Article eleven, section five specifies the provisions of county charters (generally dealing with organization) and makes no mention of municipal affairs. Subsection (g) does provide, though, that "as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein" (CAL. CONST. art. XI, § 5(g)), the charter supersedes general laws. Because of the limited nature of the matters specified, this cannot be construed as a grant of exclusive control over municipal affairs.

The exclusion of counties from the coverage of the municipal affairs provision can perhaps be explained by the fact that

[a] county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government.

County of San Mateo v. Coburn, 130 Cal. 631, 636, 63 P. 78, 80 (1900). The court in *Wilkinson v. Lund*, 102 Cal. App. 767, 283 P. 385 (1929), before quoting from other cases dealing with the authority of counties, stated:

It requires no argument to show that only such provisions of a county charter as

the general laws¹¹ (i.e., from legislative interference) with respect to municipal affairs. While cases indicate that the adoption of land-use control measures is a municipal affair,¹² there are conflicting cases which indicate that, where a municipal project extends beyond the borders of the municipality, it is a matter of statewide concern, even though it would be considered a municipal affair if confined within the municipal boundaries.¹³

It is the purpose of this Comment to examine these conflicting decisions in the context of a land-use control measure having an external impact on surrounding communities and to suggest a rationale for concluding that, when individual municipalities cannot resolve the conflict generated by the external impact of the particular measure, the matter should not be considered a municipal affair. Before embarking upon that examination, it will be necessary to discuss briefly the history of the doctrine and some of the problems the courts face in giving meaning to the ambiguous phrase "municipal affairs."

II. THE MUNICIPAL AFFAIRS DOCTRINE

A. History

The municipal affairs doctrine grew out of events of the nineteenth century. Early in the second half of that century, city officials found that they had insufficient power to combat the increasing problems facing them.¹⁴ Because of this limited authority, municipalities were forced to turn to the legislature for additional grants of authority in the

are authorized by the Constitution supersede state laws in conflict therewith and then only to the extent that such provisions are not limited by the Constitution. *Id.* at 770, 283 P. at 386. Any statements in cases referring to municipal affairs of a county must be viewed as clearly erroneous.

11. For cases dealing with the problem of what a general law is, see cases cited in note 67 *infra*.

12. See cases cited in notes 84-104 *infra*.

13. See cases cited in notes 106-33 *infra*.

14. While the cities and towns remained relatively small, the self-restraint of the legislature was well evident. Peppin, *Municipal Home Rule in California: I*, 30 CALIF. L. REV. 1, 2 (1941) [hereinafter cited as Peppin]. It was during the second half of the nineteenth century that the towns began to grow as a result of technological advances in industry and an increased level of immigration from abroad. The multiplying problems of the cities created the marked increase in the frequency of legislative interference in local affairs. S. SATO & A. VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW* 216-18 (1970) [hereinafter cited as SATO & VAN ALSTYNE]. See also H. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 5-6 (1916) [hereinafter cited as MCBAIN]; Peppin, *supra* at 3.

form of special legislation.¹⁵ This situation lent itself to the influence of corruption, powerful lobbyists and political spoilsmen.¹⁶

The necessity of seeking legislative authority each time a city wished to act was eliminated by the inclusion of article XI, section 11 of the California constitution of 1879.¹⁷ This section granted to all cities and counties the power to "make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."¹⁸ Although this represented a broad grant of power to local governmental bodies, it did not overcome the problem of legislative interference with local actions.¹⁹

In 1896, article XI, section 6 was amended to free charter cities from "the constant tampering with matters which concern only or chiefly the municipality, under the guise of laws general in form."²⁰ Even though granting charter cities substantial protection from legislative interfer-

15. This special legislation in California usually conferred extensive powers of self-government in the form of special charters, but the legislature retained the right to interfere in the affairs of the community, particularly in fiscal matters. Peppin, *supra* note 14, at 7-22.

16. Professor McBain quoted from the report of the Evarts Commission ("appointed in 1877 to devise a plan for the government of the cities of New York") as follows:

It may be true, that the first attempts to secure legislative intervention in the local affairs of our principal cities were made by good citizens in the supposed interest of reform and good government, and to counteract the schemes of corrupt officials. The notion that legislative control was the proper remedy was a serious mistake. The corrupt cliques and rings thus sought to be baffled were quick to perceive that in the business of procuring special laws concerning local affairs, they could easily outmatch the fitful and clumsy labors of disinterested citizens.

MCBAIN, *supra* note 14, at 9. The strict construction placed on enabling legislation put the municipalities at the mercy of the legislature. This strict construction is characterized by Dillon's Rule:

[A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in or incident to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation, —not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 145 (4th ed. 1890) (footnotes omitted).

17. The first "home-rule" provision was adopted as part of the Missouri constitution in 1875, and similar provisions have subsequently been adopted in more than half of the states. SATO & VAN ALSTYNE, *supra* note 14, at 217. One of the objects of the Constitutional Convention of 1879 was to take away from the legislature the power to enact special legislation and to allocate more power to the municipalities. See Peppin, *supra* note 14, at 37.

18. CAL. CONST. art. XI, § 11 (1879). This section has remained substantially unchanged since 1879. It has been renumbered and now appears at CAL. CONST. art. XI, § 7.

19. See notes 65-69 *infra* and accompanying text.

20. Popper v. Broderick, 123 Cal. 456, 461, 56 P. 53, 55 (1899) (determination of police officers' and firefighters' salaries held to be municipal affairs).

ence by providing that charter cities were subject to the general laws "except in municipal affairs,"²¹ this amendment did not afford complete protection. Charters continued to be specific grants of power, and unless a particular power was enumerated in the charter, the general law controlled, even though it pertained to a municipal affair.²²

The 1914 amendment of section 6 corrected this situation by providing that a charter city may

make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to and controlled by general laws.²³

With this amendment, charter cities were freed from all legislative interference with respect to their municipal affairs.²⁴

Cities organized under these constitutional provisions have complete autonomy to deal with matters declared to be municipal affairs. If the state also chooses to legislate on the matter, the local regulation will prevail despite a direct conflict between the local and state measures and despite the state's intention to occupy the entire field.²⁵ Conversely, if the subject matter is a matter of statewide concern, the state measure will prevail if there is a conflict with the local measure.²⁶

B. Defining "Municipal Affairs"

In the nearly eighty years since the adoption of the first municipal affairs provision, no clear-cut definition has been formulated by the courts. On the contrary, the courts maintain that the determination of

21. CAL. CONST. art. XI, § 6 (1896) (Historical Note 1896 amendment).

22. Sato, "*Municipal Affairs*" in *California*, 60 CALIF. L. REV. 1055, 1056 (1972) [hereinafter cited as Sato]; *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 769, 336 P.2d 514, 516 (1959); *West Coast Advertising Co. v. City & County of San Francisco*, 14 Cal. 2d 516, 522, 95 P.2d 138, 142 (1939); *Steger v. City of Richmond*, 194 Cal. 305, 310, 228 P. 461, 463 (1924), *appeal dismissed*, 273 U.S. 648 (1926); *Civic Center Ass'n v. Railroad Comm'n*, 175 Cal. 441, 445, 166 P. 351, 353 (1917).

23. CAL. CONST. art. XI, § 6.

24. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969); *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 769, 336 P.2d 514, 516 (1959); *West Coast Advertising Co. v. City & County of San Francisco*, 14 Cal. 2d 516, 522, 95 P.2d 138, 144 (1939).

25. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969).

26. *Id.* at 61-62, 460 P.2d at 140, 81 Cal. Rptr. at 468; *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 292-93 n.11, 384 P.2d 158, 168 n.11, 32 Cal. Rptr. 830, 840 n.11 (1963); *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 769, 336 P.2d 514, 516 (1959).

whether the subject matter is a municipal affair or a matter of statewide concern must be made on a case-by-case basis and that the concept "is not a fixed or static quantity," but "changes with the changing conditions."²⁷ An examination of two major cases will help to illustrate the problems faced by the courts in construing the concept of municipal affairs and will serve to point out the danger of over-reliance upon legislative intent or purpose.

In *Professional Fire Fighters, Inc. v. City of Los Angeles*,²⁸ the union local sued the city claiming that the city had not permitted collective bargaining.²⁹ The city responded that, notwithstanding provisions of the California Labor Code,³⁰ it had the sole authority under the municipal affairs doctrine to deal with matters pertaining to the governing of its fire department.³¹ Justice Peters, writing for the court, observed that "[t]he basic question to be determined is whether or not the matters embraced by the code sections are, when applied to the City of Los Angeles, exclusively municipal affairs."³² Explaining that the legislative purpose in each case will determine whether or not the subject matter is of local or statewide concern,³³ the court continued:

In the instant case it would appear that the Legislature was attempting to deal with labor relations on a statewide basis. . . . The total effect of all this legislation was not to deprive local government (chartered city or otherwise) of the right to manage and control its fire departments *but to create uniform fair labor practices throughout the state.*³⁴

27. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62-63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969), quoting *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963); *Century Plaza Hotel Co. v. City of Los Angeles*, 7 Cal. App. 3d 616, 621, 87 Cal. Rptr. 166, 169 (1970).

28. 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

29. *Id.* at 279, 384 P.2d at 159, 32 Cal. Rptr. at 831.

30. CAL. LABOR CODE ANN. §§ 1960-63 (West 1971).

31. 60 Cal. 2d at 280, 384 P.2d at 160, 32 Cal. Rptr. at 832; see CAL. LABOR CODE ANN. §§ 1960-61 (West 1971).

32. 60 Cal. 2d at 291, 384 P.2d at 166, 32 Cal. Rptr. at 838.

33. *Id.* at 294, 384 P.2d at 169, 32 Cal. Rptr. at 841.

34. *Id.* at 294-95, 384 P.2d at 169, 32 Cal. Rptr. at 841 (emphasis added). The court's approach is close to that applied in *Department of Water & Power v. Inyo Chem. Co.*, 16 Cal. 2d 744, 108 P.2d 410 (1940), where the court stated: "If the state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of statewide concern, then the state law applies even as to 'autonomous' charter cities." *Id.* at 754, 108 P.2d at 416 (citation omitted). This approach ignores the fact that if the subject matter is of statewide concern, the state statute will control even where there is direct conflict with a local regulation. The effect of a statute dealing with a statewide matter on local interests is irrelevant in terms of deciding what is a matter of statewide concern. Cf. *Sato*, *supra* note 22, at 1070.

While the disposition of the case may have been correct, the court's reliance on the legislative intent runs counter to the avowed purposes of the municipal affairs doctrine—to prevent the legislature from interfering with the affairs of charter cities³⁵ and to enable charter cities to “control their own affairs to the fullest extent in their own way.”³⁶ If the legislative purpose were the exclusive factor in deciding whether a particular subject is a matter of local or statewide concern, municipalities would once again be subject to legislative interference under the guise of general laws.³⁷

The problem created by exclusive reliance on legislative intent was recognized in *Bishop v. City of San Jose*,³⁸ where the supreme court noted: “[T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs”³⁹ *Bishop* considered the application to charter cities of Labor Code sections which required the payment of the prevailing wage on all public works projects.⁴⁰ In upholding the trial court's determination that the setting and payment of city employees' salaries was a municipal affair, the court stated that, in ascertaining whether or not a matter was of statewide concern, the legislative purpose was entitled to great weight and the factors underlying the enactment of the general law would be seriously considered.⁴¹ The legislature, however, was “empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.”⁴²

Bishop accurately reflected the allocation of power between the legislature and municipalities with respect to municipal affairs and recognized that a particular subject may be of such a nature to justify legislative action applicable to general law cities but not to charter cities.⁴³

35. Cf. MCBAIN, *supra* note 14, at 252.

36. *Fragley v. Phelan*, 126 Cal. 383, 387, 58 P. 923, 925 (1899).

37. See cases cited in note 67 *infra*.

38. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

39. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

40. CAL. LABOR CODE ANN. § 1771 *et seq.* (West 1971). The plaintiffs, representing electricians employed by the city, sought injunctive relief and damages for violation of the Labor Code and for violation of charter provisions requiring competitive bidding on certain public works projects. The court found it unnecessary to reach the issue of the charter violations. 1 Cal. 3d at 65, 460 P.2d at 143, 81 Cal. Rptr. at 471.

41. 1 Cal. 3d at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

42. *Id.*

43. *Id.* at 62, 460 P.2d at 140, 81 Cal. Rptr. at 468. See also *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942). It should not be concluded from this statement that a matter may be both a municipal affair and a matter of statewide concern. While both

While looking to the legislative intent in resolving the case, the *Bishop* court, unlike the court in *Professional Fire Fighters*, resorted to legislative intent merely to determine the *scope* of the subject with which the legislature was dealing.⁴⁴ Such reliance is indispensable to the resolution of any potential conflict between state law and local ordinances and is consistent with the purposes of the municipal affairs doctrine.⁴⁵ It is important to distinguish between the purposes for resorting to legislative intent, for it is only when legislative intent is used to determine whether or not a subject is of statewide concern that the municipal affairs doctrine is endangered.

The dissenting opinion of Justice Peters in *Bishop* is worthy of discussion both because of its complete disregard of the purposes which the municipal affairs provisions of the constitution were designed to serve and because it may give some insight into the problems created when legislative intent is deemed the critical factor in deciding the municipal affairs question. The legislative purpose, according to Justice Peters, is paramount in determining whether a matter is a municipal affair or a subject of statewide concern.⁴⁶ While he indicated in *Professional Fire Fighters* that the intent of the legislature was determinative,⁴⁷ the opinion in that case did not go as far as his *Bishop* dissent.

the legislature and a charter city may legislate with respect to the subject, the categories are mutually exclusive. Sato, *supra* note 22, at 1072-73. Sato's criticism was directed at the opinion in *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964). That opinion declared blithely that, "[o]f course a matter may be both a municipal affair and of statewide concern." *Id.* at 127, 396 P.2d at 814, 41 Cal. Rptr. at 398.

44. The court determined that "the Legislature did not intend that that law apply to the setting of the salaries of employees of a city, whether chartered or not." 1 Cal. 3d at 63, 460 P.2d at 142, 81 Cal. Rptr. at 470. Such a determination in effect eliminates any need for the court's prior discussion of the application of the municipal affairs doctrine.

45. See notes 35-36 *supra* and accompanying text.

46. Justice Peters relied on a statement in *City of Redwood City v. Moore*, 231 Cal. App. 2d 563, 42 Cal. Rptr. 72 (1965), that

the Legislature does have the power to change a municipal affair into a matter of statewide concern, and thus impinge upon local control, where it is the legislative purpose to deal with the particular subject matter under discussion on a statewide basis.

Id. at 580-81, 42 Cal. Rptr. at 84. The *Bishop* majority attributes this language to overemphasis on a statement contained in *Professional Fire Fighters* that legislative purpose will determine whether a matter is a state or municipal affair. 1 Cal. 3d at 63 n.6, 460 P.2d at 141 n.6, 81 Cal. Rptr. at 469 n.6.

47. The *Bishop* majority placed an interpretive gloss on the statement by adding a bracketed phrase and would have it now read: "[T]he question as to whether a matter is of municipal or statewide concern 'must be determined [by the courts] from the legislative purpose in each individual instance.'" 1 Cal. 3d at 63 n.6, 460 P.2d at 141 n.6, 81 Cal. Rptr. at 469 n.6.

In *Bishop*, he stated that where the subject matter involves both municipal and statewide concerns or where, though the subject matter involves primarily a municipal concern, part of the subject matter is of statewide concern, charter cities may act until such time as the legislature adopts a conflicting statute or otherwise occupies the field.⁴⁸ Thus the doctrine of state pre-emption⁴⁹ would be substituted for the municipal affairs doctrine, effectively nullifying the municipal affairs provisions of the constitution.⁵⁰ To support such a drastic alteration in the distribution of power between the legislature and charter cities, Justice Peters cited what he termed the "proper rule" of *Professional Fire Fighters*.⁵¹ This "rule," for which he claimed the support of "innumerable authorities,"⁵² is followed in *Professional Fire Fighters* by the caveat that it should not be confused with the "principle of state preemption,"⁵³ thus making it clear that the *Professional Fire Fighters* court considered the doctrines to be separate and distinct.⁵⁴ The coalescence of the two doctrines can be avoided if the courts follow the teachings of the *Bishop* majority and refuse to rely on legislative intent as the sole determinative factor in deciding if the application of a general law is of local or statewide concern.

Reliance on the legislative purpose to determine whether a subject is of local or statewide concern neglects the local interests that the municipal affairs doctrine was designed to protect.⁵⁵ The courts, if they are to deal with this doctrine, must develop an approach which takes into account the interests of the charter cities as well as the interests of the state, while allowing sufficient flexibility for consideration

48. *Id.* at 69, 460 P.2d at 146, 81 Cal. Rptr. at 474.

49. Under this doctrine a municipality may not enact an ordinance which conflicts with a state statute or which concerns a subject the legislature intends to occupy completely. See *In re Kochne*, 59 Cal. 2d 646, 381 P.2d 633, 30 Cal. Rptr. 809 (1963); *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959).

50. The potential result would be a return to the conditions existing prior to the 1896 amendments. See notes 14-20 *supra* and accompanying text.

51. 1 Cal. 3d at 66, 460 P.2d at 144, 81 Cal. Rptr. at 472. Justice Peters stated: "The proper rule . . . [is] 'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.'" *Id.*, quoting *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 292, 384 P.2d 158, 168, 32 Cal. Rptr. 830, 840 (1963).

52. 60 Cal. 2d at 292, 384 P.2d at 168, 32 Cal. Rptr. at 840. Contrary to his invocation of "innumerable authorities," Justice Peters cited no authority.

53. *Id.*

54. *Cf. id.* at 292 n.11, 384 P.2d at 168 n.11, 32 Cal. Rptr. at 840 n.11.

55. See notes 14-15 *supra* and accompanying text.

of the changing conditions upon which the doctrine must operate. They should consider whether the subject is such that it can be resolved at the local level, or if the local regulation would materially interfere with a pervasive state policy.⁵⁶

Applying this balancing of interests approach to the problem faced by the court in *Professional Fire Fighters*, a similar result would be reached. The right of collective bargaining, which was the subject of dispute in that case, has come to be recognized as a basic right of most employees.⁵⁷ Such a consideration weighs heavily in favor of providing regulation on a scale broader than that available at the local level. This is particularly true when the effect of local regulation on this basic right is considered. Just as private employers should not be allowed to determine unilaterally whether or not their employees will have the right of collective bargaining, neither should individual municipalities have the right to make such a determination merely on the basis of their adoption of a freeholder's charter. Application of the balancing approach to the *Bishop* facts would support the court's determination, since the desire to be paid at a particular level does not warrant the recognition accorded the more basic right of collective bargaining. The employer and employees should be allowed to work out the rate of pay on their own. Here the state interest in protecting city employees is far outweighed by the right of the municipality to determine the rate of compensation it will offer to attract those whom it desires to employ.⁵⁸

56. This is the process that is required if the standards proposed by Professor Sato are to be applied. He proposes three standards. First, "[s]tate laws should prevail where such laws deal with substantial externalities of municipal improvements, services, or other activities, regardless of whether the general laws are directed to the public sector." Sato, *supra* note 22, at 1076. The obvious reason for this is that "municipal decisionmakers" would only be restrained from imposing the effects of municipal projects on those beyond the municipal borders by the threat of retaliation. *Id.* Compare the discussion in text accompanying notes 161-208 *infra*. Second, "[s]tate laws should govern if their policies are made applicable to the public and private sectors." Sato, *supra* note 22, at 1075. This standard requires the greatest amount of balancing in its application, for it is only when the state statute exhibits a "deep concern for the welfare of the people" that it should control over local ordinances. *Id.* at 1076-77; *see* notes 57-58 *infra* and accompanying text. Third, "[m]atters of intracorporate structure and process designed to make an institution function effectively, responsively, and responsibly should generally be deemed a municipal affair." Sato, *supra* note 22, at 1077. The state interests in the matters covered by this standard are far outweighed by the local interests and the balance must be struck in favor of the local ordinances.

57. This right is recognized in the National Labor Relations Act, 29 U.S.C. § 157 (1970), and in the CAL. LABOR CODE ANN. § 1126 (West 1971).

58. *Cf.* 29 U.S.C. § 158(d) (1970). While there is a duty to bargain in good faith

Professional Fire Fighters and *Bishop* demonstrate the difficulty the courts face in interpreting the ambiguous municipal affairs provisions of the constitution. This difficulty is particularly evident where the competing interests are more equally balanced. Such is the situation with respect to land-use control measures having an external impact.

III. SHOULD LAND-USE CONTROL MEASURES BE A MUNICIPAL AFFAIR?

The question of whether or not a land-use control measure (particularly zoning) which has an external impact beyond the boundaries of the acting municipality should be a municipal affair has not yet been presented to the courts.⁵⁹ When dealing separately with zoning and external impact questions, the courts have reached opposite results. Zoning, or more accurately the adoption of a zoning ordinance or general plan, has been considered to be a municipal affair,⁶⁰ while ordinances dealing with municipal projects which extend beyond the borders of the acting municipality have been held to be matters of statewide concern.⁶¹ However, because land-use control measures are universally accepted as a valid exercise of the police power,⁶² there is a preliminary

over "wages, hours, and other terms and conditions of employment," this "obligation does not compel either party to agree to a proposal or [make] a concession . . ." *Id.* Prevailing wage laws have been upheld as constitutional on the theory that the state as the employer can, within constitutional limits, establish the wage rate to be paid to its employees. *Metropolitan Water Dist. v. Whitsett*, 215 Cal. 400, 10 P.2d 751 (1932).

59. *But cf.* *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971). The court sustained the validity of the Tahoe Regional Planning Agency (CAL. GOV'T CODE ANN. § 66801 (West Supp. 1975)). 5 Cal. 3d at 507, 487 P.2d at 1210-11, 96 Cal. Rptr. at 570-71. After holding that the Agency's powers with respect to planning and zoning were not local powers, the court continued:

Furthermore, problems which exhibit exclusively local characteristics at certain times in the life of a community, acquire larger dimensions and changed characteristics at others. "It is . . . settled that the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate." *When the effects of change are felt beyond the point of its immediate impact, it is fatuous to expect that controlling such change remains a local problem to be resolved by local methods.*

Id. at 497-98, 487 P.2d at 1204, 96 Cal. Rptr. at 564 (footnotes and citation omitted) (emphasis added). While this is a strong indication of the direction the court might take in a case dealing with the external impact of a land-use control measure, the court qualified its statement: "We do not, of course, say that planning and zoning are in all instances matters of more than local concern; we merely hold that under the instant facts they are of regional significance." *Id.* at 498 n.18, 487 P.2d at 1204 n.18, 96 Cal. Rptr. at 564 n.18.

60. See notes 85-104 *infra* and accompanying text.

61. See notes 106-33 *infra* and accompanying text.

62. The first comprehensive zoning ordinance was adopted in 1916 by the City of New York. HAGMAN, *supra* note 2, at 67. The ordinance divided the city into use zones with height and bulk controls. These zones were laid out on a map, a common feature

question which deserves brief discussion before turning to an examination of these two lines of decisions.

of modern zoning ordinances. The ordinance was upheld in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209 (N.Y. 1920). Prior to this time, cities had adopted ordinances regulating the use of land in various ways, but were generally limited to the regulation of nuisance-type activities. See HAGMAN, *supra* note 2, at 69. Professor Hagman presents a lengthy list of Supreme Court opinions of the late nineteenth and early twentieth centuries dealing with various approaches to the control of land use. ("Until the 1920's, the courts frequently held zoning ordinances invalid when non-nuisance uses were prohibited." *Id.* at 68.)

In 1926, the Supreme Court upheld comprehensive zoning as a valid exercise of the police power in the leading zoning case, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The *Euclid* case was the first Supreme Court decision dealing with the power to enact a comprehensive zoning ordinance. The ordinance in question divided the village into six classes of use districts, three classes of height districts, and four classes of area districts. In upholding the ordinance, the Court maintained:

[T]he reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Id. at 395. In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court found a zoning ordinance to be "a mere arbitrary or irrational exercise of power." There, the city zoned a corner parcel for residential use. The area on the opposite sides of the streets to the north and the west was also zoned for residential use, but the parcels adjacent to the property in question were unrestricted. The plaintiff's property remained essentially unusable for residential development.

In the most recent case, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court upheld the right of a town to zone exclusively for single-family residential use. In addition to allowing only single-family use, the ordinance defined "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." *Id.* at 2. The ordinance was challenged by a group of students from the nearby State University at Stoney Brook who had rented a house in the village, on the grounds that it violated the fourteenth amendment's equal protection clause. The majority opinion, written by Justice Douglas, did not address the issue of the external effects of the zoning ordinance on the surrounding communities, but concentrated on the power of a community to zone in order to preserve "family values, youth values, and blessings of quiet seclusion, and clean air . . ." *Id.* at 9. The Court reiterated and reinforced the presumption of the validity of a zoning ordinance by quoting with approval from *Euclid* the statement that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 4, quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). This presumption has long been an accepted part of California zoning law. See, e.g., *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 522-23, 370 P.2d 342, 347, 20 Cal. Rptr. 638, 643 (1962); *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 885-86, 264 P.2d 932, 935 (1953); *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 460-61, 202 P.2d 38, 42-43 (1949); *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 450-51, 274 P.2d 34, 38-39 (1954). See generally Walsh, *Are Local Zoning Bodies Required By The Constitution To Consider Regional Needs?*, 3 CONN. L. REV. 244, 261-62 (1971); Comment, *The General Public Interest vs. The Presumption of Zoning Ordinance Validity: A Debatable Question*, 50 J. URB. L. 129 (1972).

Justice Marshall, dissenting in *Belle Terre*, disputed the majority's conclusion that no

A. *The Police Power and the Municipal Affairs Doctrine*

It is not clear from the wording of the constitution, nor from court interpretations, whether or not police power measures were to be included within the 1896 and 1914 amendments extending autonomous home rule to charter cities with respect to their municipal affairs.⁶³

One commentator has argued that the police power provisions were not affected by the municipal affairs provisions, but rather that the purpose of the municipal affairs amendment was to deal with the problems created by the judicial definition of "general laws."⁶⁴ The California constitution of 1879 provided that all cities were to be subject to the general laws⁶⁵ and could enact "all local, police, sanitary, and other ordinances not in conflict with general laws."⁶⁶ The term "general laws" was expansively interpreted by the courts to include any law which applied generally to cities even though the law concerned only matters local in nature.⁶⁷ These holdings were subjected to much criticism in the dissents of Justice McKinstry⁶⁸ and later of Justice Fox.⁶⁹ They

fundamental rights were involved. It was his "view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy." 416 U.S. at 15. Justice Marshall also recognized the potential external effect the ordinance might have. *Id.* at 16 n.4.

In California, zoning regulations have not yet been elevated to "takings," requiring just compensation. The question of what constitutes a taking is still unsettled. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter cited as Michelman].

63. See notes 17-26 *supra* and accompanying text.

64. Sato, *supra* note 22, at 1095.

65. All charter and general law cities were to be "subject to and controlled by the general laws." CAL. CONST. art. XI, § 6 (1879) (repealed June 2, 1970).

66. CAL. CONST. art. XI, § 11 (1879) (repealed June 2, 1970); *see* note 18 *supra*.

67. *See, e.g.,* *Davies v. City of Los Angeles*, 86 Cal. 37, 24 P. 771 (1890) (statute dealing with street improvement assessment); *Ex parte Ah You*, 82 Cal. 339, 22 P. 929 (1890) (statute dealing with establishment of a police court and election of a police judge); *People ex rel. Daniels v. Henshaw*, 76 Cal. 436, 18 P. 413 (1888) (statute prescribing method of selecting police judge); *Thomason v. Ashworth*, 73 Cal. 73, 14 P. 615 (1887) (statute dealing with street improvement); *Stauder v. Board of Election Comm'rs*, 61 Cal. 313 (1882) (statute dealing with election of officers in local governmental bodies).

The court's interpretation largely negated any beneficial effect derived from the prohibition of the use of special legislation contained in article four, section twenty-five of the 1879 California constitution.

68. *People ex rel. Daniels v. Henshaw*, 76 Cal. 436, 18 P. 413 (1888); *Thomason v. Ashworth*, 73 Cal. 73, 14 P. 615 (1887); *Stauder v. Board of Election Comm'rs*, 61 Cal. 313 (1882) (McKinstry, J., concurring in the dissent of Sharpstein, J.).

69. *Davies v. City of Los Angeles*, 86 Cal. 37, 24 P. 771 (1890); *Ex parte Ah You*, 82 Cal. 339, 22 P. 929 (1890).

contended that a general law was one which applied to those within and without the city and that the legislature could not act to amend a freeholder's charter by passing a law applicable only to local affairs of the cities.⁷⁰ As was noted earlier, the delegation of the police power and the charter city provisions were contained in separate sections. The 1896 amendments, however, applied only to the provisions authorizing the formation of cities under a freeholder's charter.⁷¹ This, it was contended, supports the position that the municipal affairs amendments were meant to free the charter cities from the constant interference by the legislature under the guise of general laws (which resulted from the broad interpretation given that term by the judiciary), while the police power measures were to remain subject to the general laws and were not included within the scope of the municipal affairs provisions.⁷²

While the authority to organize under a freeholder's charter and the delegation of the police power were contained in separate sections in the constitution of 1879, neither section contained a broad grant of authority to act. The 1896 amendment was intended to result in a broad reallocation of power from the legislature to charter cities. By adoption of a charter, a city could remove itself from the control of the general laws over all matters expressly provided for in the charter if the matters were deemed to be municipal affairs. The extensive grant of power was not accompanied by any limitation with respect to police power measures. Subsequent amendments to the municipal affairs provisions support this more expansive interpretation. The 1914 amendment authorized charter cities "to make and enforce *all laws and regulations in respect to municipal affairs . . .* and in respect to other matters they shall be subject to and controlled by general laws."⁷³ This language indicates that these provisions contained all the authority required by any charter city to act on any subject matter including matters which would fall within the police power. The only question to be resolved was whether a particular subject was a municipal or state affair.

In the almost eighty years since the adoption of the municipal affairs amendment, the courts have failed to define the extent of municipal authority under the municipal affairs powers, although they have dealt generally with police power measures of charter cities. The dicta of these cases leaves the question ambiguous and unresolved.

70. See cases cited in notes 67-68 *supra*.

71. Notes 20-21 *supra* and accompanying text.

72. Sato, *supra* note 22, at 1095.

73. CAL. CONST. art. XI, § 6 (1914) (emphasis added).

In the early case of *May v. Craig*,⁷⁴ the court discussed the question of whether or not building regulations were to be considered municipal affairs:

In our opinion, the construction of improvements upon private property within a city is not a municipal affair. The city has no interest therein or control thereof, except such control is made necessary for the protection of the public welfare, and the only power which the city can exercise in relation to such private structures must come from the police power delegated by the constitution to such charter cities; and this police power is expressly made subordinate to the general law.⁷⁵

Craig would seem to be of questionable authority when contrasted with more recent decisions on zoning and general planning. Without discussing the issue of whether a police power measure could be considered a municipal affair, the California Supreme Court subsequently declared that the "procedure regulating the issuance of permits for the erection of buildings within its territorial limits [is] undeniably a 'municipal affair'"⁷⁶

In another early case, *In re Hitchcock*,⁷⁷ the court of appeal answered in the affirmative the question of whether or not "the licensing and regulation of a private patrol service or system within . . . the city . . . [was] a 'municipal affair.'"⁷⁸ The court noted:

The most frequent and usual form in which a municipality manifests its control over its municipal affairs is in the passage of police and sanitary laws . . . and when a city, either through its charter or ordinances, undertakes to provide a scheme for such protection in relation to a subject matter which is not either expressly by the Constitution, or impliedly from its nature, committed to state control, the subject matter thus laid hold upon by the municipality becomes a municipal affair over which the state legislature may no longer exercise control.⁷⁹

While one might seriously question the statement that the most frequent way in which a municipality exercises its control over its municipal affairs is by the adoption of police or sanitary laws, the fact that

74. 13 Cal. App. 368, 109 P. 842 (1910).

75. *Id.* at 369-70, 109 P. at 843.

76. *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 310, 144 P.2d 4, 9 (1944), quoting *Brougher v. Board of Pub. Works*, 205 Cal. 426, 437, 271 P. 487, 492 (1928). The *Brougher* court distinguished *May v. Craig*, 13 Cal. App. 368, 109 P. 842 (1910), by finding that there was no general statute regulating the height of buildings and thus no conflict with the local regulation. 205 Cal. at 437, 271 P. at 492.

77. 34 Cal. App. 111, 166 P. 849 (1917).

78. *Id.* at 114, 166 P. at 850.

79. *Id.*

a measure enacted under the police power could be considered a municipal affair is of great significance.⁸⁰

More recent cases have uniformly assumed that a police power measure could be considered a municipal affair.⁸¹ Although not expressly confronting the issue, these cases have held either that the subject matter was of statewide concern and therefore not a municipal affair,⁸² or that there was no conflict between the local regulation and the state law.⁸³ While it is not clear what the courts might do if squarely presented with the issue, the balance struck by past cases and a reading of the constitutional language lead to the conclusion that the scope of the municipal affairs doctrine is sufficiently broad to encompass police power measures.

B. Zoning as a Municipal Affair

Many courts, in finding zoning generally to fall within the ambit of municipal affairs, have failed to distinguish between the procedure for enacting zoning ordinances and the subject matter of the ordinances.⁸⁴ The cases have usually been limited to holding that zoning procedures constitute a municipal affair but have overlooked the question of whether or not the substantive aspects of zoning decisions should also be considered within the ambit of the municipal affairs doctrine.

In *Brougher v. Board of Public Works*,⁸⁵ the court examined the validity of a zoning ordinance enacted by a charter city in light of the city's failure to comply with the procedure prescribed in the state's en-

80. That police power regulations could be municipal affairs was recognized in two other decisions. In *City of San Mateo v. Railroad Comm'n*, 9 Cal. 2d 1, 68 P.2d 713 (1937), the court, after noting that the powers granted by article eleven, section eleven of the California constitution were available to all cities, stated: "As to such regulations as come within the definition of municipal affairs the city could remove itself from the operation of general laws by organizing under a freeholders' charter . . ." *Id.* at 8, 68 P.2d at 716. In *Porter v. City of Santa Barbara*, 140 Cal. App. 130, 35 P. 207 (1934), the court sustained the city's right to regulate the promotion and conducting of boxing events, despite the conflict with a state statute, on the grounds that the subject matter was a municipal affair. *Id.* at 132, 35 P. at 208.

81. *See, e.g., Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 144 P.2d 4 (1943).

82. *See, e.g., Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942); *Ex parte Daniels*, 183 Cal. 636, 192 P. 442 (1920); *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 168 P.2d 767 (1946).

83. *See, e.g., In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970); *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

84. *See* cases cited in notes 85-104 *infra*.

85. 205 Cal. 426, 271 P. 487 (1928).

abling act.⁸⁶ Previous cases holding that "the zoning power of freeholder chartered cities . . . is derived from the [state enabling act]"⁸⁷ were relied upon by petitioner to support the general applicability of the enabling act. The court, although acknowledging the existence of these holdings, noted that "[i]n every instance . . . it has also been stated that such power is also derived from the constitution of the state."⁸⁸ It is not at all clear, however, that the pre-*Brougher* courts were referring to the municipal affairs provisions and not to the police power provisions of the constitution, or that they intended the zoning power of a charter city to come within the protection of the municipal affairs doctrine. Nevertheless, the *Brougher* court maintained that none of the previous cases decided the question of whether or not the state enabling act was applicable to charter cities.⁸⁹ By equating the adoption of zoning procedures with the adoption of other municipal ordinances, the court concluded that the enabling act was inapplicable to charter cities because "[i]t has repeatedly been held . . . that the manner of enacting municipal ordinances is a municipal affair."⁹⁰

Assuming the validity of the *Brougher* holding, it does not necessarily follow that, because the procedure for adopting zoning ordinances is a municipal affair, the subject matter of a zoning ordinance, *i.e.*, the division of the city into varied use districts, should likewise be consid-

86. The enabling act in force at the time provided that the city council require the city planning commission to recommend appropriate zoning regulations and prohibited the council from enacting such an ordinance until after the filing of the commission's final report and the holding of a public hearing. The city adopted a zoning ordinance after giving only the notice required by its charter for all ordinances and did not submit the proposed ordinance to the planning commission for its recommendations. *Id.* at 430-31, 271 P. at 489.

87. *Id.* at 435, 271 P. at 491, citing *Dwyer v. City Council*, 200 Cal. 505, 253 P. 932 (1927), *Fourcade v. City & County of San Francisco*, 196 Cal. 655, 238 P. 934 (1925), *Zahn v. Board of Pub. Works*, 195 Cal. 497, 234 P. 388 (1925), *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925), and *A.C. Blumenthal & Co. v. Cryer*, 71 Cal. App. 668, 236 P. 216 (1925).

88. 205 Cal. at 436, 271 P. at 491.

89. *Id.*

90. *Id.* at 438, 271 P. at 492 (citations omitted). It could be argued, however, that since a zoning ordinance essentially involves the restriction of the owner's right to use his property as freely as he might without the zoning ordinance and for which restriction no compensation is required, the application of additional safeguards would be required to prevent arbitrary action on the part of the municipalities. When this is the case, the establishment of such safeguards should not be left to individual municipalities, but should be considered a matter of statewide concern for which the legislature could establish procedures applicable to all cities including charter cities. When such protections are not required, the proper procedure for the adoption of ordinances may properly be left to the charter cities.

ered a municipal affair. The courts, however, have not shown any inclination toward reversing this holding⁹¹ and in recent cases dealing with the adoption of a general plan, have continued to hold that the manner of its adoption is a municipal affair.⁹²

A further development of the concept that the adoption of ordinances is a municipal affair is found in *Fletcher v. Porter*.⁹³ There, citizens of Palo Alto presented an initiative petition to the city council calling for a special election to enact an ordinance to require the adoption of a master plan and the prohibition of zoning changes permitting manufacturing or industrial uses until the Planning Commission had recommended a master plan to the council. The council refused to submit the initiative to the electorate.⁹⁴

The court rejected the city's contention that the initiative process could not be used to abrogate the authority granted by the legislature to deal with statewide affairs:

To the extent that it attempts to adopt by reference sections 65460-65516 of the Government Code relating to the procedure for adopting a master plan, it is local in nature; the adoption of a master plan effects no statewide consequences.⁹⁵

91. See *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 144 P.2d 4 (1943) (procedure for the issuance of building permits is a municipal affair); *Lima v. Woodruff*, 107 Cal. App. 285, 290 P. 480 (1930) (the manner of adopting a zoning ordinance is a municipal affair).

92. See, e.g., *Duran v. Cassidy*, 28 Cal. App. 3d 574, 104 Cal. Rptr. 793 (1972); *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965); *Fletcher v. Porter*, 203 Cal. App. 2d 313, 21 Cal. Rptr. 452 (1962).

93. 203 Cal. App. 2d 313, 21 Cal. Rptr. 452 (1962). This was a proceeding in mandamus to compel the examination of signatures on the petition and to compel the city council either to enact the ordinance or to submit it to the electorate.

94. *Id.* at 316, 21 Cal. Rptr. at 453.

95. *Id.* at 319, 21 Cal. Rptr. at 455. The sections of the Government Code referred to by the court required a planning commission of a city or county to adopt "a comprehensive, long-term general plan for the physical development of the city, county, area, or region." Ch. 1355, § 2, [1953] Cal. Stat. 2917 (*repealed* ch. 1880, § 8, [1965] Cal. Stat. 4350) (similar sections now appear at CAL. GOV'T CODE ANN. § 65350 *et seq.* (West 1966)). The plan could also cover "land outside its boundaries which in the commission's judgment bears relation to its planning." *Id.* The elements that could be included in a master plan were set forth in former sections 65463-74. Ch. 1355, § 2, [1953] Cal. Stat. 2917-19 (*repealed* ch. 1644, § 44, [1955] Cal. Stat. 2973, and ch. 1880, § 8, [1965] Cal. Stat. 4350) (similar sections now appear at CAL. GOV'T CODE ANN. § 65350 *et seq.* (West 1966)). The remaining sections specified procedures for adopting master plans.

It should be noted that section 65500 indicated a recognition by the legislature that the adoption of a master plan may indeed affect those beyond the confines of the municipal border. That section provides in part: "Master regional plans shall be coordinated with similar plans of adjoining regions, and area, county, and city master plans

If by this the court meant the procedure by which a master plan is adopted, it is consistent with other opinions holding that the method of adopting an ordinance is a municipal affair.⁹⁶ However, if it meant that the necessity of adopting a master plan or its content was a municipal affair, it is logically incorrect. Later in the opinion, the court, after concluding that provisions of the proposed ordinance⁹⁷ did not constitute zoning, stated: "But even if we dealt with a zoning ordinance here, we must still observe that zoning is a 'municipal affair' over which a charter city has supreme control and which lies beyond the scope of legislative action."⁹⁸

In two other cases involving the right of the electorate to amend the general plan through the initiative process, similar language was used. The first of these cases, *O'Loane v. O'Rourke*,⁹⁹ dealt with the powers of a general law city, and for this reason it is unclear from the opinion what importance attaches to the court's statement that "[t]he matter of the adoption of a general plan in a city is purely a local matter and is not a matter of statewide legislative concern."¹⁰⁰ It is also unclear whether or not the court realized the full impact of the statement that "[m]any facets of activities between other public agencies and the city are effectively determined by the plan."¹⁰¹ It is at least arguable that the court's language suggests recognition of the potential externalities of city planning and that, if the issue were whether or not a charter city had the power to deal with the subject matter to the exclusion of the state's general laws, the language could support a holding that city planning is not a municipal affair. At the present time, no case has con-

shall be coordinated so as to fit properly into the master plan for the region." Ch. 1355, § 2, [1953] Cal. Stat. 2919 (*repealed*, ch. 1880, § 8, [1965] Cal. Stat. 4350) (similar sections now appear at CAL. GOV'T CODE ANN. § 65350 *et seq.* (West 1966)).

96. See text accompanying notes 85-91 *supra*.

97. Subsection (f) was designed to maintain the status quo until the remaining provisions could be carried out. 203 Cal. App. 2d at 317-18, 21 Cal. Rptr. at 458 (1962).

98. *Id.* at 324, 21 Cal. Rptr. at 458 (emphasis added) (*dictum*). The court cites *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 144 P.2d 4 (1943), to support this proposition. The *Lindell* case, however, stated that only the procedure for issuing building permits is a municipal affair (*id.* at 310, 144 P.2d at 9) and not that zoning, as such, was a municipal affair. See cases cited in note 91 *supra*. The facts of the case, presenting a question of the procedure for adopting a zoning ordinance, did not warrant the loose language of the court.

99. 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).

100. *Id.* at 783, 42 Cal. Rptr. at 288. The court failed to consider the potential impact that the general plan of one municipality may have on the neighboring municipalities. In the metropolitan areas such a possibility is substantial.

101. *Id.* It is confusing how the court can recognize this fact and still find the matter of adopting a general plan to be a "purely local matter."

sidered the ability of a charter city to adopt a general plan which affects inhabitants of areas beyond its municipal border.

The second case, *Duran v. Cassidy*,¹⁰² involved a charter city, and the court addressed itself to the powers of such a city to adopt a general plan: "The adoption and amendment of a general plan is a local legislative matter and not of statewide concern."¹⁰³ The statement, though, is merely dictum as the court was assuming without any evidence that the project, which the initiative proposal sought to prohibit, was "part of a general plan of the city."¹⁰⁴ Without such an assumption, the court could not have reached the municipal affairs issue.

Brougher, Fletcher, O'Rourke, and Cassidy recognize that there are important local interests in land-use control which must be considered in any attempt to deal with the problem on a scale broader than that of municipality-by-municipality. None of these cases, however, can be cited for any proposition other than that the adoption of a zoning ordinance or general plan by a charter city is a municipal affair. The cases do not hold that the content of or necessity for a municipal zoning ordinance is a municipal affair, nor do they cover a situation where there is an apparent impact on areas beyond the municipal borders.

C. *Projects Beyond the City's Border—Not a Municipal Affair*

When dealing with a challenge to a public improvement project which extends beyond the municipal boundaries, courts have consistently held that the improvement may not be considered a municipal affair.¹⁰⁵ This principle was recognized in *Gadd v. McGuire*,¹⁰⁶ which discussed the constitutionality of the City Boundary Line Act.¹⁰⁷ The City of Los Angeles inaugurated proceedings under the Act to construct a storm sewer system which lay partly within and partly without the city boundaries. When the board of public works of the city refused

102. 28 Cal. App. 3d 574, 104 Cal. Rptr. 793 (1972).

103. *Id.* at 583, 104 Cal. Rptr. at 800.

104. *Id.*

105. *See, e.g.,* *Wilson v. City of San Bernardino*, 186 Cal. App. 2d 603, 611, 9 Cal. Rptr. 431, 436 (1960).

106. 69 Cal. App. 347, 231 P. 754 (1924).

107. Ch. 496, [1911] Cal. Stat. 1018. The Act authorized the improvement of streets running along the border of a municipality by means of forming an assessment district with the consent of each municipality or county involved. The work authorized by the Act "include[d] construction of sanitary sewers, storm sewers, drains, and drainage systems for sanitary or drainage purposes in or along the streets which form or cross the exterior boundary or boundaries of such municipalities" 69 Cal. App. at 351, 231 P. at 756.

to execute a contract awarded by the city council, the individual to whom the contract was awarded brought a mandamus action to compel the execution of the contract. The board defended on the basis that the subject matter was a municipal affair and that to the extent the Boundary Line Act purported to authorize action with respect to a municipal affair, it was unconstitutional.¹⁰⁸ The court first noted that the charter itself declared that any powers it contained with respect to improvements were supplemental to powers granted to all municipalities by the general laws¹⁰⁹ and, therefore, the expressed election to proceed under the general law was within the scope of the city's powers. Secondly, the court held that the Act did not deal with a municipal affair.¹¹⁰ In defining the term municipal affair, the court stated:

An improvement may not be said to be a "municipal affair," within the meaning of the constitution, if it is not of *special* concern to the inhabitants of, or to the owners of property in, the particular city If it is of general concern to the inhabitants and property owners of a city . . . in common with inhabitants . . . of the state at large . . . it is not a purely "municipal affair". . . .¹¹¹

This definition did not aid in the resolution of the problem,¹¹² but the meaning became more definite when the court referred to the Act as authorizing an improvement which "*does not lie wholly within any one city . . . and which does not concern alone or especially the inhabitants . . . of any one city . . .*"¹¹³ When the court used the phrase "specially concerns," it appears that it intended to limit the scope of the municipal affairs doctrine with respect to municipal improvement projects to those which are constructed within the city boundaries and which have no effect on inhabitants beyond the borders of the city.¹¹⁴

108. 69 Cal. App. at 353, 231 P. at 757.

109. *Id.* at 353-54, 231 P. at 757.

110. *Id.* at 355, 231 P. at 759.

111. *Id.* at 355, 231 P. at 757.

112. When is a matter of special concern to the inhabitants of the city? When is a matter of general concern to the inhabitants in common with inhabitants of the state at large? The court's statement offers little by way of substance in defining municipal affairs.

113. 69 Cal. App. at 355, 231 P. at 758 (emphasis added). This statement lends support to the conclusion that a land-use control measure which has an external impact should not be a municipal affair.

114. There is a community of interest between inhabitants within and without the municipal boundaries.

[Municipal improvements] may and do become affairs of a broader scope which cannot be handled adequately by the municipal authorities of a single city or town for the reason that they . . . affect the inhabitants . . . of two or more cities or towns . . . in such a way that the purposes sought to be accomplished by the improvement can be effected only by a single, comprehensive scheme

The externalities of municipal improvements¹¹⁵ were further examined when the constitutionality of the Metropolitan Water District Act was challenged in *City of Pasadena v. Chamberlain*.¹¹⁶ The Act authorized the formation of a water district encompassing several municipalities.¹¹⁷ It was challenged on the basis that it conferred powers on charter cities beyond those conferred by their charters and thus constituted an interference with the municipal affairs of the city.¹¹⁸ In upholding the Act, the court found that its purpose was the equitable distribution and use of water throughout an area and concluded that when the purpose or subject matter necessarily transcends the municipal boundaries, it ceases to be a municipal affair.¹¹⁹

Both *Gadd* and *Chamberlain* considered attempts by the legislature to establish procedures whereby municipalities, including charter cities, could band together to deal with problems which could not properly be dealt with by any one of them acting alone.¹²⁰ The taking of combined action enabled each municipality to confer a benefit on the other participating governmental bodies¹²¹ by adding to the resources available to combat the particular problem. While factually distinguishable from most situations involving the external costs created by a single municipality's zoning decision,¹²² these cases do support the proposition that

Id. at 357, 231 P. at 759. Similar language can be found in other cases treating municipal projects which transcend local boundaries. *E.g.*, *Henshaw v. Foster*, 176 Cal. 507, 169 P. 82 (1917); *Pasadena Park Improvement Co. v. Lelande*, 175 Cal. 511, 166 P. 341 (1917); *Pixley v. Saunders*, 168 Cal. 152, 141 P. 815 (1914); *Van de Water v. Pridham*, 33 Cal. App. 252, 164 P. 1136 (1917).

115. See cases cited in note 114 *supra*.

116. 204 Cal. 653, 269 P. 630 (1928).

117. *Id.* at 655, 269 P. at 631.

118. *Id.* at 659, 269 P. at 632-33.

119. The impossibility or impracticability of any one or more of such municipalities acting separately and independently in the acquisition and distribution of such water would seem to argue conclusively that in achieving such object by the means provided for in said act the municipalities engaged therein could not be held to be engaged in the conduct of a merely municipal affair.

Id. at 660, 269 P. at 633. A similar result was reached in *Pixley v. Saunders*, 168 Cal. 152, 141 P. 815 (1914), where the court upheld the Sanitary District Act of 1891 against a challenge that it interfered with the municipal affairs of the community.

120. See generally *City of Sacramento v. Southgate Recreation & Park Dist.*, 230 Cal. App. 2d 916, 41 Cal. Rptr. 452 (1964); *Wilson v. City of San Bernardino*, 186 Cal. App. 2d 603, 9 Cal. Rptr. 431 (1960); *Brooks, The Metropolis, Home Rule, and the Special District*, 11 HASTINGS L.J. 246 (1960).

121. Any benefits received, though, might be minimized by such costs as the contribution of support to the district.

122. See cases cited in notes 149-72 *infra*; *Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 684 (1973) [hereinafter cited as *Ellickson*].

the action of a charter city cannot be considered a municipal affair when it affects those beyond its borders.

Additional support for the proposition that actions of a charter city having an impact beyond its borders are not municipal affairs is found in the more recent case of *Pacific Telephone & Telegraph Co. v. City & County of San Francisco*.¹²³ In *Pacific Telephone*, the court considered the question of whether or not "the construction and maintenance of telephone lines in the streets and other public places within the city today [is] a matter of state concern or a municipal affair . . ."¹²⁴ The city contended that the construction was a municipal affair over which it had exclusive control and over which it had plenary power to grant franchises for telephone construction within the city.¹²⁵ The court rejected this argument on the basis of evidence which tended to show that the effect of the city's exercise of exclusive control would extend not only to control over the telephone communications system of the city, but also to control of telephone communications throughout the state, the country, and even the world.¹²⁶ The power of exclusive control necessarily includes the power of exclusion with a possible resulting interruption in the telephone communication system within and without the city. The possibility of a substantial external impact, no matter how speculative, led the court to conclude that

it is apparent that because of the interest of the people throughout the state in the existence of telephone lines in the streets in the city, the right and obligation to construct and maintain telephone lines has become a matter of state concern.¹²⁷

Similarly, in *City of Santa Clara v. Von Raesfeld*,¹²⁸ a bond issue to finance Santa Clara's share of an "inter-municipal water pollution-control facility"¹²⁹ became the subject of litigation. The court, although

123. 51 Cal. 2d 766, 336 P.2d 514 (1959).

124. *Id.* at 767, 336 P.2d at 515.

125. *Id.*

126. If the telephone lines were removed from the streets in the city, the people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so. *Id.* at 773, 336 P.2d at 518. Though it does not appear that the city intended to take such drastic action, the possibility of local interference with a matter affecting the state as a whole is sufficient to remove the subject matter from the exclusive control of a charter city.

127. *Id.* at 774, 336 P.2d at 519.

128. 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970).

129. *Id.* at 243, 474 P.2d at 977, 90 Cal. Rptr. at 9. The city was unable to sell the bonds at the prescribed rate of interest. The city council subsequently passed a resolution authorizing the sale of bonds at an increased rate in accordance with an urgency measure passed by the legislature. The original bond election authorized the issuance

noting that "the treatment and disposal of city sewage" and the financing of sewage facilities have historically been regarded as municipal affairs,¹³⁰ stated:

As in the case of other municipal projects, however, sewer projects may transcend the boundaries of one or several municipalities. . . . In such circumstances the project "ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state."¹³¹

What emerges from the *Gadd*, *Chamberlain*, *Pacific Telephone*, and *Von Raesfeld* decisions is the proposition that improvement projects of charter cities that transcend municipal boundaries cannot be considered municipal affairs. While the rationale of these cases seems sufficient to encompass land-use control measures, the narrower holdings of these cases are insufficient to assure general applicability to a subject matter previously identified as a matter of local concern¹³² and where the extent of the external impact is less obvious.¹³³

IV. A BASIS FOR DECISION

While the courts have only recently recognized that zoning ordinances have an external effect on surrounding areas¹³⁴ or can be justified on the basis of land use in the surrounding areas,¹³⁵ they have not recognized the reciprocal nature of conflicting demands for the use of land resources. For example, if City *A* decided to zone an area near

of the bonds with a maximum interest rate of six percent per annum. The urgency measure, CAL. GOV'T CODE ANN. §§ 53540-41 (West Supp. 1975), authorized the issuance of the previously authorized bonds at seven percent per annum. 3 Cal. 3d at 243, 474 P.2d at 977, 90 Cal. Rptr. at 9.

130. 3 Cal. 3d at 246, 474 P.2d at 979, 90 Cal. Rptr. at 11. The City Manager refused to issue the bonds without another election as required by the city charter.

131. *Id.*, 474 P.2d at 980, 90 Cal. Rptr. at 12. Professor Sato criticizes the rationale of the *Von Raesfeld* decision, contending that the court failed to distinguish between the substance of pollution control laws and the procedure for enacting them. He argues that the former is properly subject to the control of the state, while the latter belongs within the jurisdiction of the locality. Sato, *supra* note 22, at 1086.

132. See cases cited in notes 85-106 *supra*.

133. The impact in many cases, while physical in nature (*e.g.*, increased traffic flow or pollution), will be less clear to the casual observer than is the impact of an improvement project.

134. See, *e.g.*, cases cited in notes 150-69 *infra* and accompanying text.

135. See, *e.g.*, *Valley View Village, Inc. v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Town of Los Altos Hills v. Adobe Creek Properties, Inc.*, 32 Cal. App. 3d 488, 108 Cal. Rptr. 271 (1973); *Lionshead Lake, Inc. v. Wayne Township*, 89 A.2d 693 (N.J. 1952), *appeal dismissed*, 344 U.S. 919 (1953). See generally Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107.

its border to allow construction of a commercial district, City *B* might complain that the proposed commercial development would interfere with its existing residential use of the area on its side of the border. Traditional analysis, which would only consider ways to control City *A*'s action, neglects the fact that, but for the use to which City *B* puts its land, City *A* would be able to use its land in the way that it desires.¹³⁶ The question in such a situation, then, is not who is responsible for the externality, for both are responsible; rather, the question is how to avoid the conflict with the least cost to society.¹³⁷

A. Externalities

Before the question of how the conflict should be resolved can be answered, the externalities which caused the conflict must be identified. While the term externalities has been variously defined,¹³⁸ it is used here to denote the effect of City *A*'s action, taken in pursuit of a

136. Cf. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 2 (1960) [hereinafter cited as Coase]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151-55 (1971) [hereinafter cited as Sax].

137. This cost is measured by the decline in value of all of the land affected by the conflict. The value to society of a particular use is generally reflected in the market value of that use. Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293, 297, 299 (1969) [hereinafter cited as *Economic Analysis*]. The market value of a particular use is expressible in a lump sum of money and "is exactly equivalent to the right to receive the particular future benefits encompassed in the property under consideration." H. BABCOCK, APPRAISAL PRINCIPLES AND PROCEDURE 95 (1968).

Market value should not be confused with market price. Market price is the price actually asked or paid for any particular use and may be more or less than the value of a particular use. The difficulty of assigning value to subjective costs may lead the market mechanism to misstate the value of a particular use to society. *Economic Analysis*, *supra* at 297.

Professor Ellickson has identified the loss in value of the property resulting from conflicting land uses as nuisance costs. In addition, he identifies two other types of costs, prevention costs and administrative costs. Prevention costs represent the costs incurred by either party in reducing nuisance costs. Administrative costs represent public and private expenditures in obtaining "information, negotiating, writing agreements and laws, policing agreements and rules, and arranging for the execution of preventive measures." Ellickson, *supra* note 122, at 689; cf. Michelman, *supra* note 62, at 1214-15.

138. See, e.g., R. MCKEAN, EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS 134 (1958) [hereinafter cited as MCKEAN] ("impact of actions by some . . . on the activities of others, . . . not directly felt by the first group"); DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499, 1509 (1969) [hereinafter cited as DeVany] ("some social cost or benefit . . . which was not taken into account by the owner in deciding how to use his property rights"); Hirsch & Shapiro, *Some Economic Implications of City Planning*, 14 U.C.L.A.L. REV. 1312, 1316 (1967) ("an external economy is an external effect that tends to increase the value of a neighboring property. An external diseconomy has the opposite impact").

legitimate purpose, on the enjoyment that City *B* derives from the use of its property.¹³⁹

It is also necessary to make a further distinction between types of externalities, since not all externalities affect the efficient allocation of resources.¹⁴⁰ Those that do are referred to as *technological* externalities and those that do not are referred to as *pecuniary* externalities.¹⁴¹ Generally defined, technological externalities are those which affect the physical satisfaction (output) derived from a given input (land use),¹⁴² while pecuniary externalities are those which do not affect the physical output or satisfaction derived from physical inputs.¹⁴³ To achieve the most efficient allocation of resources, it is only necessary to consider technological externalities,¹⁴⁴ because it is the satisfaction derived from the use of property that is paramount in zoning decisions.

In practice, this distinction is often difficult to make because an action may create both types of externalities.¹⁴⁵ For example, locational changes may occur because of some pecuniary externality. To the ex-

139. Mishan, *The Economics of Disamenity*, 14 NATURAL RES. J. 55, 57-58 (1974) [hereinafter cited as Mishan]. In the true economic sense such an effect ceases to be an externality when it has been internalized. *Id.* "Internalized" describes the state of affairs that exists when the costs of *A*'s action are considered by *A* in deciding to take the action. Internalization is a method of conflict resolution. See note 187 *infra*.

140. While efficiency is generally accepted as the goal in decisions regarding the allocation and use of resources, government cannot ignore the problem of the "fairness" of the distribution of the benefits of the resources. These two goals, efficiency and fairness, are inextricably intertwined in most government actions. It is possible, though, for government to take an action which would not achieve the highest level of efficiency if the action has a generally equalizing effect on distribution of the products of resource use. Cf. Michelman, *supra* note 62, at 1181-83. See generally note 180 *infra*.

141. MCKEAN, *supra* note 138, at 135-36.

142. *Id.* at 135. McKean uses the example of "a storage dam [which] raises the water table so as to impair the productivity of surrounding acreage . . ." *Id.* The unproductiveness of the land resource causes a definite loss to society. *Id.* A decision by City *A* allowing development of an area within its boundaries which would generate increased traffic flow through adjacent residential areas in City *B* would result in a decrease in the satisfaction derived from the residential land. This decrease represents a cost to society; the resource (land) is no longer producing the same level of output (satisfaction).

143. *Id.* at 136. Pecuniary externalities are characterized by shifts in prices which result in resources being attracted to different uses because of action taken by City *A*; there is no decrease in the level of production caused by the shift. *Id.* at 137.

144. If City *A* zoned an area to allow commercial development, it would be likely to cause a shift downward in the price of similarly zoned land in City *B*. This might cause that land to be sold for a loss (or at least for a smaller profit) by the owner, but it would not decrease the production derived from the land; the same level of output would be obtained from the same unit of input. For a more detailed discussion of pecuniary externalities, see *id.* at 136-41.

145. *Id.* at 150.

tent that a change in location will alter the physical output from a given input, it is a technological externality.¹⁴⁶ Another particularly confusing aspect is that the distinction between pecuniary and technological externalities in land-use cases is often obscured because both may be reflected in the price of a parcel of land.¹⁴⁷ Thus changes in market price may or may not accurately reflect technological externalities.

For instance, suppose that City *A* zones an area near its border¹⁴⁸ for commercial use and that the development of an attractive shopping center causes the demand for commercial property in City *B* to drop. The decreased demand may be reflected in the market price of land in City *B*. Since there is, however, no reduction in the level of pleasure or satisfaction derived from each unit of input, the effect represents a pecuniary externality and should not be considered by City *A*. Now suppose that City *A*'s decision to allow commercial development will cause increased traffic on streets in the surrounding area, including those running through City *B*, and will result in increased noise. Each of these activities will reduce the amount of enjoyment that residents in City *B* can derive from the residential use of their land. To the extent that the satisfactions derived from the use of a person's land are reflected in the price others will pay for it, the impact of City *A*'s rezoning decision will be measured by a reduction in the market price. While the result in both situations is the same, the externality in the latter situation affects the satisfaction (output) derived from the use of the land (input) and is therefore a technological externality which should be considered by City *A* in reaching a decision about rezoning.

While some courts have considered the external effect of zoning on surrounding communities,¹⁴⁹ they have not made any distinction be-

146. *Id.* at 143.

147. *Id.* at 144.

148. *Cf. id.* at 143. This seems to be a common occurrence. See cases cited in notes 151-71 *infra* and accompanying text.

149. The Supreme Court, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), noted that there might be "cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390. The New Jersey Supreme Court has said:

What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. . . . Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality. . . .

Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 64 A.2d 347, 349-50 (N.J. 1949); see cases cited in note 136 *supra* and notes 151-71 *infra*.

tween types of externalities. The following examination, however, will show that the externalities on which the courts have focused generally fall within the definition of technological externalities, although some pecuniary externalities were considered. In *Borough of Cresskill v. Borough of Dumont*,¹⁵⁰ the Borough of Dumont amended its zoning ordinance to change a one block area, lying on its border with Cresskill and two other municipalities, from a residential to a business zone. The adjacent areas within the adjoining municipalities were zoned and developed for residential purposes. The amendment was challenged by owners of lots on the block in question and by the neighboring boroughs on the grounds that the ordinance failed to

take into consideration the physical, economic, and social conditions prevailing throughout the entire area of [the] four municipalities and the use to which the land in that region can and may be put most advantageously, and that [there was] . . . utter disregard of the contiguous residential areas of the plaintiff boroughs.¹⁵¹

The court, although recognizing that the borough's zoning decision could adversely affect the adjoining communities,¹⁵² did not attempt to distinguish between types of externalities. The evidence presented at the trial reveals that both technological and pecuniary externalities were considered. Both sides presented evidence of the effect of the ordinance on property values. To the extent that a reduction in value reflects a decrease in satisfaction derived from the use of the property for residential purposes,¹⁵³ it represents a technological externality and should be considered in the zoning decision. To the extent that such a reduction in value only represents reduced rents or shifts in resources, it represents a pecuniary externality and should not be considered.¹⁵⁴ Other evidence indicated that the zoning decision would cause increased traffic, lack of parking, and potential safety hazards.¹⁵⁵ These effects are related directly to the satisfaction derived from the use of the resi-

150. 104 A.2d 441 (N.J. 1954).

151. *Id.* at 442.

152. *Id.* at 445-46. The holding in the case was that the rezoning of the block constituted spot zoning (zoning a small area of land differently from the surrounding area where such a change "is not in the public interest or is not in accord with a comprehensive plan" (HAGMAN, *supra* note 3, at 169-70)). The court also avoided deciding whether or not residents of the adjoining boroughs had standing to challenge the zoning ordinance of Dumont. 104 A.2d at 444.

153. Justice Douglas described the amenities of residential neighborhoods in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); see note 59 *supra*.

154. See text accompanying notes 141-69 *supra*.

155. 104 A.2d at 444.

dential property and should be considered a technological externality.¹⁵⁶

The New Jersey courts were again presented with a similar question in *Borough of Roselle Park v. Township of Union*.¹⁵⁷ A developer applied for and was granted a variance to allow construction of a three-story senior citizens' housing project in a residential zone near the municipal border. Roselle Park, an adjacent municipality, challenged the granting of the variance on the ground that Union failed to consider evidence of the external impact of its decision on Roselle Park. The evidence pointed to the possibility of increased traffic flow, flooded conditions in Roselle Park, and increased population density in the area.¹⁵⁸ Each of these factors can be properly categorized as a technological externality; each would interfere with the use of the property and should be considered as a cost of the proposed project. Again the court did not attempt to categorize the externalities, but this failure was insignificant since the court held that, "contrary to plaintiff's claims, . . . the variance would not increase traffic congestion, cause flooding or add to the population density of the area."¹⁵⁹

In California, a similar factual context was presented in *Scott v. City of Indian Wells*.¹⁶⁰ The city granted a conditional use permit¹⁶¹ for the construction of a planned condominium development in an area formerly zoned for single-family residential use.¹⁶² In granting the permit, the council refused to consider the views of the surrounding non-city resident property owners.¹⁶³ The court recognized that the zoning decisions of municipalities often transcend the municipal boundaries and that "it is clear that the development of a parcel on the city's edge will substantially affect the value and usability of an adjacent parcel on

156. When such effects are present, the municipality

[a]t the very least . . . owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of [the acting municipality].

Id. at 445-46.

157. 272 A.2d 762 (N.J. 1970).

158. *Id.* at 763.

159. *Id.* at 767 (reporter's note).

160. 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

161. This permit allows a property owner to use his property in a way not normally allowed in the existing zone, thus allowing flexibility in the application of a comprehensive zoning scheme. It is a privilege and not a right and is therefore usually left to the discretion of the zoning authority of the municipality. See generally HAGMAN, *supra* note 3, at 206-11.

162. 6 Cal. 3d at 544, 492 P.2d at 1138, 99 Cal. Rptr. at 746.

163. *Id.* at 545, 492 P.2d at 1138, 99 Cal. Rptr. at 746; see note 161 *supra*.

the other side of the municipal line."¹⁶⁴ Although requiring the municipality to recognize and consider externalities,¹⁶⁵ the court did not attempt to analyze the externalities actually created. By recognizing, however, that municipal development affects the usability of adjacent parcels, steps were taken in the right direction.

The United States District Court for the Northern District of California, in *Construction Industry Association v. City of Petaluma*,¹⁶⁶ recently examined the external impacts of local growth regulations. Extensive findings discussed the external effects of Petaluma's ordinance limiting the number of permits for new housing construction that could be issued in each year. The court found that such a limitation would have far-ranging effects on the housing market within the San Francisco metropolitan region. By limiting the supply of housing within a growth center, the city forced those seeking new housing to look elsewhere, thus increasing the demand in those areas with a resulting increase in the cost of private housing.¹⁶⁷ This, standing alone, would seem to be a pecuniary externality; the reduction in the supply of one product causes a shift in demand to other products

164. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749. The court also stated that "[w]e have come to recognize that local zoning may have even a regional impact." *Id.*, citing *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 492-94 n.16, 487 P.2d 1193, 1201 n.16, 96 Cal. Rptr. 553, 561 n.16 (1971). If this is an accurate view of the court's outlook today, it indicates that zoning could be declared a non-municipal affair when the appropriate fact situation is presented. See notes 83 & 113 *supra*.

165. After discussing authorities from other jurisdictions, the court concluded:

We are satisfied that the City of Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents, a duty to hear their views, and a duty to consider the proposed development with respect to its effect on *all* neighboring property owners. We are also satisfied that adjoining landowners who are not city residents may enforce these duties by appropriate legal proceedings and have standing to challenge zoning decisions of the city which affect their property.

6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.

166. 375 F. Supp. 574 (N.D. Cal. 1974). In declaring Petaluma's ordinance unconstitutional, the court based its decision on the "fundamental right" of freedom to travel, *id.* at 581, and did not reach the plaintiffs' other contentions that the ordinance was invalid under the commerce clause or the equal protection clause. *Id.* at 586. The court distinguished its holding from that of the Supreme Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), by stating:

It was found there that the right to travel was not involved in a zoning regulation which prohibited groups of unmarried persons from living together in the village. In the present case, however, the very reason for being of the "Petaluma Plan" is to keep people out, a patent attempt to affect such excluded persons right to travel. Accordingly, unlike the *Boraas* decision, the compelling governmental interest standard of review must still be employed in the case at bar, since "fundamental" rights are affected.

375 F. Supp. at 584 n.1.

167. 375 F. Supp. at 575-81.

accompanied by a rise in the price of those products.¹⁶⁸ If this were the only effect, Petaluma's action would be justified in terms of allocational efficiency.¹⁶⁹ The court, however, found that there were other effects: the reduction in the supply of available housing forced families to retain housing longer.¹⁷⁰ This meant that housing which would have normally been phased out of the market would be retained longer with a resulting decrease in the overall quality of housing in the region.¹⁷¹ There would also be a corresponding increase in the public services required for the area.¹⁷² Additionally, the court found that if the supply of housing is maintained at less than demand, there would be a resulting increase in the density of population within the areas which have not limited the construction of housing. Implicit in this finding was the conclusion that as the population density increases, the satisfaction to be derived from the use of the land decreases. Each of these findings dealt with a technological externality; each affects the output or satisfaction that can be derived from a given input, and as such, concerns a factor which should have been considered by the decision-making community.

Identifying situations in which externalities exist and distinguishing between those externalities which are important in terms of efficient allocation of resources (technological) and those which are not (pecuniary), while significant, is only part of the problem. The more difficult task, and the more significant one for resolving the municipal affairs question, is choosing the best means of eliminating the conflict over the use of resources.

B. *Market Transactions and Government Regulation*

The potential means of resolving the conflict are as varied as the imagination of those dealing with the problem,¹⁷³ but can generally be grouped in two broad categories: market transactions and government

168. See MCKEAN, *supra* note 138, at 138-41.

169. Even if the action produced an efficient allocation of resources, there would be other reasons, such as equitable considerations, for challenging the action of Petaluma (on other than constitutional grounds). See note 140 *supra*.

170. 375 F. Supp. at 575-81.

171. *Id.* at 579-80.

172. *Id.* at 580. Such services include fire and police protection, schools, recreational facilities, sanitation facilities, and social services.

173. See, e.g., Ellickson, *supra* note 122; Marks & Taber, *supra* note 5; Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

regulation.¹⁷⁴ If the conflict created by the competing claims of municipalities for the use of common resources can be resolved through market transactions, there is no sufficient justification for holding that the subject is a matter of statewide concern. If, however, resolution of the conflict requires some form of government regulation, sufficient justification exists to support the holding that the subject is not a municipal affair.

Determination of whether or not the conflict can be resolved through market transactions requires a brief examination of some basic economic concepts.¹⁷⁵ One of the primary concerns of a market economy¹⁷⁶ is to provide a mechanism for determining the most efficient¹⁷⁷

174. Cf. Ellickson, *supra* note 122, at 684-87; Sax, *supra* note 136, at 172-76.

175. The analysis which follows is made with the realization that application of economic analysis to legal problems is subject to misuse by reason of the failure of some of the assumptions required by the "competitive market paradigm." Polinsky, *Economic Analysis As A Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1680-81 (1974) [hereinafter cited as Polinsky]. Nevertheless the analysis should provide a basis for explaining why, in a general sense, land-use control measures should not be considered municipal affairs.

It is not the purpose of this Comment to relate in detail all of the economic arguments with their associated nuances, but merely to apply the basic analysis to the intergovernmental conflict situation in order to demonstrate why the internalization of the externalities associated with a zoning decision cannot be accomplished by individual municipalities. For the reader who wishes to examine some of the materials dealing with externalities, see Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); *Coase Theorem Symposium* (pts. 1-2), 13 NATURAL RES. J. 557 (1973), 14 NATURAL RES. J. 1 (1974); Demsetz, *Some Aspects of Property Rights*, 9 J. LAW & ECON. 61 (1966); Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. LAW & ECON. 11 (1964); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEG. STUDIES 13 (1972); DeVany, *supra* note 138; Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429 (1971); Mishan, *Welfare Criteria for External Effects*, 51 AM. ECON. REV. 594 (1961); Mishan, *Pareto Optimality and the Law*, 19 OXFORD ECON. PAPERS 255 (1967); Polinsky, *supra*; Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427 (1972); Turvey, *On Divergencies Between Social Cost and Private Cost*, 30 ECONOMICA 309 (1963); Wellisz, *On External Diseconomies and the Government-Assisted Invisible Hand*, 31 ECONOMICA 345 (1964); *Economic Analysis*, *supra* note 137; Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

176. For a general discussion of the free market economy, see R. DORFMAN, *PRICES AND MARKETS* 7 (1967) [hereinafter cited as DORFMAN].

177. In its economic sense an allocation of resources is said to be efficient if there is no possible reallocation whereby at least one person could gain without making another person lose. Polinsky, *supra* note 175, at 1664. A change in resource allocation would be efficient if those who benefit from the change were willing to pay compensation to those who lose to ensure that the losers will not lose even more. *Id.*; Michel-

allocation of resources.¹⁷⁸ This mechanism is the price system.¹⁷⁹ Ideally, it would provide a means of transmitting information¹⁸⁰ that enables the individual participants to determine the most effective employment of the resources they control.¹⁸¹ Assuming that each participant acts consistently to maximize his personal welfare, *i.e.*, rationally,¹⁸² there will be strong equalizing forces pushing the market price toward a point of equilibrium.¹⁸³ In order for the price system to result in an efficient allocation of resources, the price of each product must accurately reflect the benefits and costs underlying the price determination.¹⁸⁴ Impediments to the smooth functioning of the market, resulting from a failure to reflect all benefits or costs, will cause a distortion of prices, and, therefore, an efficient allocation of resources is not likely to occur.¹⁸⁵ It is in this situation that externalities¹⁸⁶ exist

man, *supra* note 62, at 1173. Actual payment of compensation is not required; only a "hypothetical willingness to pay and accept" is required. *Id.* at 1177. What is important is that over the long run aggregate gains exceed aggregate losses. Compensation must be paid only to ensure a reasonable expectation that "when the effects of all measures are summed from time to time, no one will have been hurt while some will have benefited through the overall collective enterprise," or when the distributional result is ethically unacceptable. *Id.*

178. A distinction should be made between allocation, which refers to the mixture of inputs required to produce a desired output of products or welfare, and distribution, which refers to the way in which the results of the production are divided. Michelman, *supra* note 62, at 1168 n.4; *cf.* G. STIGLER, *THE THEORY OF PRICE* 12-18 (3d ed. 1966) [hereinafter cited as STIGLER]. Economists generally concern themselves only with the question of allocation leaving the distributional question to others. Ellickson, *supra* note 122, at 690; Polinsky, *supra* note 175, at 1669.

179. The price system is a system of economic organization in which each individual . . . decides for himself what contribution he will make to the economy with the understanding that he can obtain the goods and services contributed by other individuals only at prices acceptable to them.

R. DORFMAN, *THE PRICE SYSTEM* 3 (1964). For a discussion and analysis of the establishment of prices in a competitive market, see STIGLER, *supra* note 178, at 176-90.

180. DORFMAN, *supra* note 176, at 7; R. DORFMAN, *THE PRICE SYSTEM* 6-10 (1964).

181. Each participant possesses certain factor endowments or resources such as personal skills, physical assets, and capital. *Cf.* Polinsky, *supra* note 175, at 1666.

182. The idea of acting rationally in an economic sense is an outgrowth of the utility theory which in general terms advanced the concept that a person acted with a view to maximizing his pleasure or utility. The substance of this theory has been retained in modern economic analysis. See STIGLER, *supra* note 178, at 46-83.

183. The equilibrium point represents that point at which supply equals demand for any given commodity. When either supply or demand changes, there will be a corresponding change in the other and in the equilibrium price. DORFMAN, *supra* note 176, at 25; see Polinsky, *supra* note 175, at 1666.

184. O. ECKSTEIN, *PUBLIC FINANCE* 11 (1964).

185. *Id.* It is possible, however, that even where prices do not reflect all benefits and costs, an efficient allocation of resources could result by accident.

186. See note 138 *supra* and accompanying text.

and for which it is necessary to provide a means of internalization.¹⁸⁷

To understand the significance of these impediments with respect to the market's capacity for conflict resolution, it will be useful to examine the market process in its purest form, *i.e.*, when there are no impediments to its smooth functioning.¹⁸⁸ In a free market, rights are clearly defined and freely transferable. Each participant has complete knowledge of every factor bearing on any transaction, and there are no costs of initiating, negotiating, or enforcing the transaction agreement; it is a market of perfect competition. Suppose City *A* is considering a zoning change to allow commercial development of a presently vacant area near its common border with City *B*, which will have the effect of reducing the satisfaction and enjoyment the residents of City *B* derive from the use of their residentially zoned property.¹⁸⁹ Suppose also that the proposed commercial development will generate increased traffic and noise and will necessitate an increase in expenditures by City *B* for street maintenance and traffic control and that the total loss to City *B* will be five.¹⁹⁰ In the absence of a rule imposing liability on City *A* for the damage,¹⁹¹ City *B* would offer to pay up to five to City *A* in return for its agreement to forgo the proposed zoning change.¹⁹² The acceptance of the offer would represent income to City *A*, while the rejection of the offer would represent a loss of income.¹⁹³ Whether accepted or rejected, the cost of City *A*'s decision to City *B* will have been internalized and incorporated in City *A*'s decisional calculus. If the benefit from the proposed action exceeded the amount of the offer, the action would be taken. If the benefit did not exceed the amount of the offer, the action would then not be taken and the offer would be accepted. For example, if City *A* expected to derive a benefit of six by proceeding with the zoning change, the offer of five could be

187. Internalization is used to describe the process whereby the external costs of an action are brought to bear on the decision-making process. For a brief discussion of alternative means, see Note, *The Cost-Internalization Case for Class Actions*, 21 *STAN. L. REV.* 383, 398-404 (1969).

188. Such a market exists only in theory. See text accompanying notes 199-201 *infra*.

189. Such a loss is equally as important as physical outputs derived from the use of resources. Cf. McKean, *supra* note 138, at 135.

190. The numbers used here have been arbitrarily chosen to represent some unspecified unit of value. They are not meant to correspond to any actual real world value, but are used for purposes of illustration only.

191. This is the situation that presently exists in the absence of a successful nuisance or inverse condemnation suit. The normal remedy is to seek declaratory relief to determine the constitutionality of the zoning ordinance.

192. The offer actually made would depend upon the probability that the action would really be taken. Coase, *supra* note 136, at 7.

193. Cf. *id.*

rejected and City *A* could still obtain a benefit of one.¹⁹⁴ If, however, City *A* expected to derive a benefit of four from the proposed change, City *A* would then be willing to accept anything greater than four to retain the present zoning, and since City *B* would offer up to five, both cities could benefit by reaching agreement at an amount between four and five.¹⁹⁵

If liability were imposed on City *A* for the damage caused by its zoning decision,¹⁹⁶ the cost imposed on City *B* would be included in City *A*'s decisional calculus by considering its potential liability. The same considerations as above would apply here as well. If the future benefit is greater than the potential liability, it would then still be beneficial to City *A* to institute the change. If, however, the future benefit is less than the potential liability, City *A* would then choose to retain its present zoning scheme.¹⁹⁷ The result in either situation, whether or not liability is imposed, is that City *A* must consider the impact of its decision on City *B*. In both cases the price reflects all of the benefits and costs, and an efficient allocation of resources should be obtained.¹⁹⁸

If conflicts between municipalities were as easily resolved as they would be in a market free of impediments, there would be no need to alter the current state of the municipal affairs doctrine. That free market, however, is not a realistic assumption.¹⁹⁹ The costs of operating the market frequently outweigh any gain to be derived from the bargaining process. These costs, often referred to as transaction costs,²⁰⁰ include costs of negotiating, administering the bargain, and

194. By choosing to take the action, City *A* will receive a benefit of six, while it could have received five from City *B* by not taking the action. Therefore the net benefit derived from the decision is one.

195. Any agreed upon sum greater than four and less than five would benefit both parties. See Coase, *supra* note 136, at 2-8.

196. Diminution in value caused by a zoning restriction is generally held to be a non-compensable exercise of the police power. Even where the ordinance is declared to be invalid, the "usual remedy has been through nullification of the offending ordinances." Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URB. LAW. 25 (1973); see notes 62-191 *supra*.

197. Coase, *supra* note 136, at 5.

198. This is, of course, the goal of any zoning scheme. See text accompanying notes 140-44 *supra*. A basic premise of Coase's article is that rules of liability are neutral as they relate to allocation, *i.e.*, resources will be allocated the same in a free market, whether liability is imposed on City *A* or not. It is only necessary to know which situation exists so that the market may function properly. Coase, *supra* note 136, at 8.

199. "[A]n economist would be hard put to find any situation where the assignment of liability has an absolutely neutral effect on resource allocation." Randall, *Coasian Externalities Theory in a Policy Context*, 14 NATURAL RES. J. 35, 44 (1974). Coase also admits that this is an unrealistic assumption. Coase, *supra* note 136, at 15.

200. The term, as used in this Comment, includes all costs which prevent the market

making capital outlays to carry out the bargain.²⁰¹ Professor Coase points out:

Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights [that will lead to an increase in the value of production] will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about.²⁰²

Professor Coase recognizes the idea that there may be situations in which potential gains could be realized in an impediment-free market but which are not realized because of transaction costs. The problem is finding a means whereby the externalities can be internalized and resources efficiently allocated.²⁰³

Numerous costs might detract from any potential gain to be derived from bargaining between Cities *A* and *B*. To illustrate the problem,

mechanism from functioning smoothly but not all costs which prevent the efficient allocation of resources. See Polinsky, *supra* note 175, at 1667 n.67.

201. Coase, *supra* note 136, at 15; Mishan, *supra* note 139, at 69 (the most significant of these costs are those of negotiating which includes the costs of taking the initiative and organizing the participants).

202. Coase, *supra* note 136, at 15.

203. Some suggest that this should be accomplished by reducing transaction costs so the market can function freely and that to accomplish this liability rules should favor the cheapest cost avoider. See, e.g., Coase, *supra* note 136, at 16. Others suggest that the solution must be determined on an ad hoc basis and that attempting to mimic the market may result in shifting costs rather than reducing them. See, e.g., Polinsky, *supra* note 175, at 1673-74. It should also be noted that government regulation as a means of internalization, particularly in the area of land use, has been attacked. "[D]irect governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm." Coase, *supra* note 136, at 18. In the area of zoning, the use of governmental intervention has also been assailed.

One option for handling externalities from unneighborly land uses is to adopt a *laissez faire* distribution of property rights, and rely entirely upon informal social forces rather than governmental action to control land use decisions. . . . [L]egal sanctions are among the least civilized ways of handling conflicts between neighbors.

Ellickson, *supra* note 122, at 685. It has been contended that while government regulation may be justified when the value of the resource is low in comparison to the costs of acquiring the necessary information to support a freely functioning pricing system, such regulation is inefficient and should give way to the use of the pricing system when the value of the resource exceeds the cost of information acquisition. Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NATURAL RES. J. 89 (1973) [hereinafter cited as Krier & Montgomery]. The use of government intervention, particularly in the field of zoning, is supported by Richard Babcock, who views zoning as an "adjunct of the market mechanism," stating:

We start with the premise that the arrangement of the community land uses should be the product of social preferences; and that, but for the imperfections of the real estate market, the market interactions of demand and supply would create a city so arranged. Thus we view city planning as a device for releasing the basic forces of demand rather than inhibiting them.

R. BABCOCK, *THE ZONING GAME* 117 (1966) (citations omitted).

however, it will be necessary to identify only a few. First, there are the costs of gathering the information required to effectively measure the harm caused by the proposed zoning change.²⁰⁴ Much of the damage will be subjective and difficult to quantify.²⁰⁵ For example, what is the value of the loss due to the increased noise?²⁰⁶ Other elements of damage, while not as subjective, may still be speculative. The increase in the flow of traffic may necessitate increased expenditures for street maintenance, a factor which at best can only be approximated by traffic studies and projections.²⁰⁷ In addition, costs associated with the bargaining process itself may diminish the benefits of using a bargaining process. The problem of convincing a majority of those responsible for determining whether or not an offer should be made²⁰⁸ that the offer could result in a gain to the party making the offer creates additional barriers to the effective utilization of this process. It may be politically impossible to convince enough people that public funds should be paid to a neighboring municipality to force alteration of its planned zoning change.

The existence of transaction costs precludes resolution of the conflict between the municipalities through market transactions except in situations where the potential gains from a given transaction are sufficiently large.²⁰⁹ Where they are not, it will be necessary to provide an alternate method of resolving the conflict. This will require a reallocation of the power to govern certain aspects of land-use control, from the municipalities to a level of government having a broader jurisdiction. The balance struck in favor of local interests by past decisions confronting land-use control measures must be shifted to broader statewide interests especially when the conflict over the use of resources exceeds municipal boundaries.

V. CONCLUSION

The goal of this Comment was to provide a rationale for the conclu-

204. See generally Krier & Montgomery, *supra* note 203; Polinsky, *supra* note 175, at 1668.

205. Merely because they are difficult to measure does not justify their being ignored. *Economic Analysis*, *supra* note 137, at 297.

206. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 5 (1974).

207. See, e.g., J. LINDSAY, *THE CITY* 63-65 (1969); A. MACDONALD, *AMERICAN CITY GOVERNMENT AND ADMINISTRATION* 476-96 (4th ed. 1946).

208. This would be considered a cost of negotiating. See note 201 *supra*.

209. If the potential gains or losses are sufficiently high, then it would still pay to attempt to "bargain" though the transaction costs are high as well. Cf. Krier & Montgomery, *supra* note 203.

sion that land-use control measures having an impact beyond the municipal borders should be considered a municipal affair. The initial impact of such a decision would be to bring charter cities within the ambit of state laws pertaining to local planning and zoning regulations.²¹⁰ This would eliminate any question concerning the current requirement that charter cities must adopt general plans,²¹¹ but would have little effect otherwise because the legislature has declared that such laws do not apply to charter cities.²¹² The real significance of such a determination lies in the flexibility the legislature would have in providing means of resolving conflicts arising from the use of land resources.²¹³ With the municipal affairs limitation removed, legislative answers to the problem should be forthcoming.²¹⁴

The conclusion reached by this Comment assumes that police power measures can be included within the concept of municipal affairs. It also recognizes that when a municipality regulates the use of its land so that it influences the use or enjoyment derived from the use of land in surrounding municipalities, a conflict arises for which a means of resolution must be provided.²¹⁵ Since the costs of surmounting the con-

210. CAL. GOV'T CODE ANN. § 65100 *et seq.* (West 1966).

211. Government Code section 65700 provides in part that "charter cities shall adopt general plans" containing "the mandatory elements." CAL. GOV'T CODE ANN. § 65700 (West Supp. 1975). If the adoption of a general plan were to remain a municipal affair, this section would be unenforceable against a charter city choosing not to adopt such a plan. *Cf.* cases cited in notes 85-104 *supra*.

212. Government Code section 65700 declares with respect to local planning:

The provisions of this chapter shall not apply to a charter city, except to the extent that the same may be adopted by charter or ordinance of the city; except that charter cities shall adopt general plans in any case . . . and such plans shall contain the mandatory elements . . .

CAL. GOV'T CODE ANN. § 65700 (West Supp. 1975). Government Code section 65803 (CAL. GOV'T CODE ANN. § 65803 (West 1966)) is similarly worded but contains only the exception as to adoption by charter or ordinance.

213. As an initial step the legislature should repeal sections 65700 and 65803. By repealing these sections charter cities would be required by section 65305 to submit the general plan to the planning agencies of neighboring governments for comment. The efficacy of such a requirement, which is directory and not mandatory, may be of questionable effect in resolving conflicts over land resources, but it would at least be a step in the right direction. Charter cities would also be brought under the requirement found in section 65860 directing that zoning ordinances be consistent with the general plan. *Cf.* Opinion of Legislative Counsel of California, 1972 SENATE J. 8013, 8014-17.

214. The range of possible solutions is as broad as the legislative imagination. Perhaps the most viable solution is the creation of area councils made up of representatives of municipal bodies within the jurisdiction of the council, which would have sufficient authority to resolve any conflicts over the use of land resources while having maximum responsibility for determining the most effective use of the land to the local government bodies.

215. There are indications that the legislature has realized its important role and will

flict at the local level generally exceed the benefits to be derived, the problem must be approached on a broader scale. The interests of solving municipal problems at the local level must be subordinated to the statewide interests of providing for an efficient use of resources.

Acceptance of this premise necessarily leads to the conclusion that land-use control measures which have an effect beyond the municipal borders must be considered matters of statewide concern. This conclusion is consistent with the cases involving extra-municipal improvement projects where the courts have concluded that the carrying out of such projects become matters of statewide concern when they transcend the municipal borders even though they would have been considered municipal affairs if confined within municipal boundaries. The cases involved with the adoption of land-use control measures are equally consistent with the conclusion of this Comment if limited to the narrow subject of adopting local ordinances.²¹⁶

The municipal affairs doctrine is a legitimate and worthwhile concept when properly applied, but it serves only to hamper the efficient use of resources when it is applied to problems which cannot be effectively managed at the municipal level. Only if this restriction is eliminated can the conflict over the use of resources be resolved.

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take steps to provide a means for resolving conflicts over the use of land. *See, e.g.*, Cal. A.B. 2978, Reg. Sess. (1973-1974) (provides for the administration, at the state level, of land use planning and for coordination of planning among the state and local governments).

It has been suggested that externalities can be dealt with best if the rights to a resource are the exclusive rights of one person and if the rights are freely exchangeable and easily enforceable. DeVany, *supra* note 138. Such characteristics could be easily embodied in a regional zoning agency.

216. The method of adopting an ordinance does not significantly affect those beyond the borders (presuming compliance with minimum due process measures). It is only when these latter cases are extended to encompass the substantive aspects of land-use control that they become inconsistent with the conclusion of this Comment. *See* text accompanying notes 85-104 *supra*.